Blasphemy and the Law of Religious Liberty in Nineteenth-Century America

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IN 1811, CHIEF JUDGE JAMES KENT OF THE COURT OF APPEALS OF NEW YORK upheld the conviction of John Ruggles for blasphemy. Ruggles's crime was shouting "*Jesus Christ* was a bastard, and his mother must be a whore." He was convicted after a jury concluded that "these words were uttered in a wanton manner, and, as they evidently import, with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion." Ruggles had openly and wantonly reviled Jesus and Mary, with no purpose other than abusing and offending his audience. In contemporary England, such "contumelious reproaches or profane ridicule of Christ or Holy Scripture" were treated as common law crimes. English courts reasoned that "whatever strikes at the root of christianity, tends manifestly to the dissolution of civil government."[1]

Ruggles's lawyer seized on the obvious distinction between the union of church and state in England and the provisions of New York's constitution allowing "free toleration to all religions and all kinds of worship" and prohibiting any official relationship between church and state. He argued that "*christianity* did not make a part of the common law of this state." How could an offense against Christianity be criminally punished if Christianity had no legal status—if there were no established religion to defend and all forms of religion were freely tolerated? The new constitutional order made such a question a difficult and troubling one.[2]

The separation of religion from government in the new Republic unsettled centuries of legal custom. Among other changes, the constitu-

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tional protection of religious liberty in New York and other states challenged the authority of traditional restraints on speech and behavior. To legislators and constitutional theorists in the early nineteenth century, John Ruggles and other dissenters were examples of the dangers created by unrestrained liberty. The explosive qualities of religious liberty revealed the fragility of the new constitutional order. How to rein in the grosser tendencies of this explosion, to prevent liberty from degenerating into its opposite, "license"? Exploring the meaning of religious liberty as they punished blasphemers, nineteenth-century legists discovered and struggled to control a weakness in their constitutional democracy.

Dissenters in the new republic exploited the absence of traditional links between church and state, challenging courts to explain why some language was dangerous beyond the mandate for toleration. Frequently those accused of blasphemy fused their challenges with attacks on traditional sexual morality, forcing defenders of Christianity to explain how verbal offenses sapped the moral sensibility of Americans. The dilemma and the perceived duty of legal regulation were to guard the liberties of the people against licentiousness cloaked by spurious claims of religious difference. Through the delineation of the crucial difference between religious and moral debate, on the one hand, and vituperative and subversive rhetoric, on the other, American judges and jurisprudes refashioned the law of church and state. They tailored their English legal heritage to fit (and flatter) its American environment.

While blasphemy jurisprudence remains a largely overlooked piece of American legal history, those historians who have studied the case law have dismissed it as a meaningless vestige of English law or attacked it as a blatant violation of civil liberties. This article, while it does not deny the British ancestry of blasphemy law or its anti-libertarian thrust, argues that scholars have overlooked the reconstruction of religious liberty in American constitutional thought and case law after independence. Judge Kent, surely, was keen to embrace the social and political control inherited from a vigorous English tradition and adapted English legal reasoning to the case of John Ruggles. Yet there was a crucial difference, for the state church and monarchical government of the mother country made the punishment of dissenters a less onerous intellectual and jurisprudential task in England than in the new United States.[3]

Through the investigation of the controversies that gave rise to blasphemy prosecutions, we recover a richer sense of the history of constitutional law and theory, as well as a view of religious dissent that

is otherwise screened from historians' gaze. This article recovers the earlier struggles of believers, skeptics, dissidents, and the courts charged with maintaining order. The issues they faced, and the law that grew out of their conflict, are both foreign and familiar. The problem of dissent and legal authority, as well as corresponding questions of the boundaries of liberty in a constitutional democracy, remain vital and contested in the twenty-first century. Judges and commentators, to be sure, no longer speak of Christianity as protected by law, but the reasoning and doctrines that underlie blasphemy opinions have survived. The distinction between freedom to believe and accountability for action, first articulated in blasphemy cases, remains central, if controversial, in American constitutional law and theory. As Supreme Court Justice Antonin Scalia wrote in a recent opinion, religious belief cannot justify criminal behavior. "[O]therwise prohibitable conduct," Scalia insisted in a case involving the ingestion of peyote by members of the Native American Church, is not excused by the fact that it is "accompanied by religious convictions."[4]

Furthermore, significant portions of contemporary constitutional jurisprudence and theory are descendants of blasphemous forebears. "Fighting words" and "hate speech" statutes and accompanying legal doctrines, which punish vituperative and vindictive rhetoric, are related offenses. Blasphemy and offenses included in the concept such as obscenity and pornography, traditionally viewed as manifestations of anti-constitutional licentiousness have only in the twentieth century acquired an identity separable from politics and violent behavior. Those who would prohibit pornography because of the political consequences of its sexual speech and imagery are not revolutionizing the debate (viewed, at least, in historical terms) but rather are seeking to redraw lines once readily perceived, and broadly accepted. Only in the last half-century or so has the punishment of blasphemers been widely viewed as contrary to, rather than consistent with or even supportive of, religious liberty.[5]

I

Ruggles and other major blasphemy opinions remained good law throughout the nineteenth century and well into the twentieth. Explained at length in treatises on libel and slander, embraced by eminent jurists such as Joseph Story and Thomas Cooley as an essential component of religious liberty, the law of blasphemy rested on the

understanding that attacks on Christianity were anything but protected speech. The contours of the Christianity protected by law remained amorphous, but lack of clarity should not be confused with lack of commitment. Most American statesmen agreed on the moral importance of faith to a constitutional democracy, however much they disagreed about the proper scope of religious liberty in America.

In his landmark decision, Judge Kent rejected Ruggles's argument that religious liberty should protect his outburst. Instead, Kent held that "those principles of virtue, which help to bind society together" did not depend on any particular religious establishment. Rather, punishment of the blasphemer was part of the "moral discipline" of the law created by the "people of this state." The law of the people, Kent insisted, reflected the people's "profess[ion of] the general doctrines of christianity, as the rule of their faith and practice." The offense was against the earthly sovereign—the people of New York. Using the people as touchstone, Kent explained why Ruggles must be punished and why "attacks upon the religion of *Mahomet* or of the grand *Lama*" were not within the purview of American law: "for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply engrafted upon Christianity, and not upon the doctrines or worship of those impostors." Every European country ("a single and monitory case excepted"—surely revolutionary France) kept a watchful eye over the public morals. Governments routinely punished "[t]hings which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances of seduction, have, upon the same principle, been held indictable; and shall we form an exception in these particulars to the rest of the civilized world?" The existence of savage tribes in North America, Kent held, did not undermine the fact that "Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law."[6]

This "Christianity in general" described the boundaries of religious liberty in the new American republic. Liberty of belief was distinguished in constitutional law from "acts of licentiousness, or . . . practices inconsistent with the peace and safety of this state." "License," in this view, was the abuse and negation of liberty. Without the distinction between liberty and license, liberty could not be protected from those who would exploit and degrade it. Ruggles's attack on Christianity, Kent insisted, was an example of license. The argument that religious liberty should protect such vituperation was thus nothing

more than an attempt to clothe licentiousness with a misleading veneer, confusing the abuse of liberty with its exercise.[7]

Other aspects of the legal system confirmed Kent's holding. The legal stature of generalized Christianity, Kent emphasized, was born out by the "*statute for preventing immorality*," which consecrated Sunday as "holy time." The very apparatus for determining truth in the legal system also rested on the integration of faith and law. Failure to punish blasphemy would compromise the integrity of the sworn oaths of legal witnesses, which were required by statute to be based on "laying the hand on and kissing the gospels." Vilification of the gospels was in this sense an attack on the moral foundation of law. President Washington himself warned American citizens in his farewell address that "the security for property, for reputation, for life [would evaporate] if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in Courts of Justice." Failure to protect the religious power of oaths would undermine the rule of law altogether, Washington, Kent and others predicted, plunging the new nation into self-destructive chaos.[8]

Equally important, Kent insisted, was that the punishment of blasphemy was consistent with separation of church and state. Punishment was not the imposition of belief, according to proponents. Instead, it was the consequence of a deliberate and provocative act of "defiance to all public order, [the] disregard of all decency, [with] contumelious reproaches, scoffing at and reviling that which is certainly the religion of the country." Religious "opinion, whatever it may be, and free and decent discussion on any religious subject" were protected by constitutional provisions for freedom of conscience. But the open vilification of religion "with malicious and blasphemous contempt," was an "abuse" of the right of religious liberty. The doctrinal distinction in judicial decisions between belief (which was absolutely protected from state intervention and oversight) and action (which could validly be punished) tracked the constitutional distinction between liberty and licentiousness.[9]

Such a legal edifice could not be constructed without opposition. The creation of such a body of law is not so much evidence that Americans or their constitutions were indelibly Christian; rather, blasphemy jurisprudence documents the effort that went into building a legal framework in which the punishment of blasphemers was part of American constitutional consciousness. For such an enterprise, religious dissent

was indispensable. Of course, dissenters as well as lawyers were conditioned by the instability that was the legacy of the Revolution and the separation of church and state in the decades following independence. They were also deeply affected by innovative and competitive forms of religious expression that blossomed in the new nation. Faith and apprehensions of its vulnerability propelled attackers as well as defenders of Christianity to take the power of words seriously.[10]

II

Historians of American Protestantism have documented the dominance of an affective, emotive theology by the early nineteenth century. As religious sensibilities spread across of the nation, personal experience, innate morality, and subjective reason validated internal forms of knowing as authentic. In such an intuitive moral order, the stirring of the heart was the key to religious experience. Emotional intensity assured salvation. The allocation of spiritual authority away from formalism and intellect and into sympathy and emotion had profound consequences for religious expression as well as religious experience. Sermons as exercises in storytelling—tales of individual virtue in the face of suffering designed to arouse compassion, identification, sentiment—were beloved of nineteenth-century evangelicals. Charles Grandison Finney, for example, openly advocated theatrical sermonizing to embody and augment religious fervor.[11]

Graphic language connected sensation to words, subjective response to verbal description. Narrative strategies expanded the available languages of meaning and connected individual storytellers and listeners in emotional response to moving tales. As one minister put it, "[n]ever [did his parishioners] love one another so well as when they witness the outpouring of each other's hearts in prayer." Sharing stories of the struggle for faith, believers also shared the "warm and overpowering feelings" of sympathy and moral sensibility. The proliferation of such powerful speaking, emphasizing emotional decibels over doctrine, validated the stories of a new spectrum of speakers. Even white women, enslaved women and men, and children were now hearable in liberal Protestant storytelling. This embrace of the tales of sympathetic (or just plain pathetic) speakers implicitly rejected theological rigor in favor of a more visceral empathic identification. Remarking on this expansion, one historian has claimed that religion prospered in the nineteenth century as theology went "bankrupt."[12]

The analogy to economic fortune, while it may exaggerate the devaluation of doctrine, captures the social effects of religious diversity, disestablishment, and social and geographic mobility. Competition and religious enthusiasm, already in motion before the Revolution, metastasized after 1790. In the heady atmosphere of change, migration and freedom, Christian witness spread in waves across the expanding nation. Competition for congregants catapulted revivalists whose only training might be a galvanizing conversion experience and a talent for "plain speaking" into positions of national power and visibility. Finney, for example, a recovering lawyer, traveled around the North. He preached in business attire, charging his listeners to search their hearts for signs of awakening. He literally "made a case" for faith, exhorting his listeners as he would a jury, persuading them through eloquence of the merits of his "client," Jesus.[13]

Finney's brand of revivalism, like that of many of his contemporaries, was broadly millennial. He espoused "a progressive, patriotic Christianity" that molded itself to and helped create a broad but vague religious unity within diversity. Generically Protestant but largely lacking credal content other than a basic conviction of the centrality of America in cosmic history, this patriotic faith eventually collapsed the distinction between religion and republicanism. Nonetheless, the challenge to clerics whose stale dogma choked "the warm and living spirit" carried with it the seeds of a more general challenge to traditional authorities of all kinds. The difficulty lay in constructing a unifying, rather than a disintegrating, foundation for the emotional outpourings of converts.[14]

Believing Christians learned that the reconstruction of congregants' loyalties in this anti-authoritarian, anti-doctrinal atmosphere was much more readily accomplished in a disestablished framework. In one example, although he opposed it at the time the evangelical preacher Lyman Beecher reflected later that disestablishment in 1818 was the best thing that ever happened to Christianity in Connecticut. The spread of Christian faith and the elimination of external state support seemed so integrally connected that many liberal clerics embraced the American political system as the key to religious growth and power. In this light, disestablishment was essential to the only truly "Christian" government in the world. As minister Robert Baird explained in 1844 to his European counterparts, exclusion from direct access to power made Christianity all the more powerful: "The separation of church and state, is, with us, considered almost, if not universally, a blessing."

The flourishing of Christian witness in disestablishment earned the loyalty of grateful believers. Religious voluntarism, despite the predictions of conservative Europeans, increased religious commitment and political confidence. "The voluntary principle," said Alpheus Packard, Professor of Natural and Revealed Religion at Bowdoin College, in 1856, "has tended, unquestionably, to foster the spirit of nationality." Freedom of conscience allowed "public as well as private virtue" to flourish in the fullness of individual religious experience.[15] The revolt against traditional sources of religious authority in favor of subjective conscience thus became (paradoxically enough) a device of unification. "The new movement," as the historian Donald Mathews put it, was in fact "more significant than the destruction of the old [established] order." Religious liberty awakened a faith that had immediate political consequences—the "enactment of American nationalism," social cohesion achieved through the multiplicity of voices.[16]

III

Those who blasphemed challenged the cozy equation between religious expression and patriotism, however. Dramatic verbal portraits of religious experience and bold new speakers also created a fruitful environment for heretical words to reverberate through the hearts and minds of Americans. Indeed, the concept of blasphemy is language-based, a recognition of the power of words in a faith characterized by its logocentricity. As the literary critic Edward Lawson put it, "[w]here God is Word, the Devil is anti-Word—not merely . . . the absence of Word but its perversion. The status of blasphemy follows on the importance of Scripture." Access to Scripture by ordinary persons, a critical feature of the Reformation's insistence on the "Christian liberty" of uncoerced belief, periodizes modern blasphemy law as a Protestant by-product.[17]

In post-revolutionary America, logocentricity described not only a Christian's relationship to God, but also a citizen's relationship to the state. As one scholar termed it, the new government was a "logocracy," a polity called into being by words. The new, language-centered sovereign created a mandate for the exchange of words of power between citizens. The potency of communication between moral subjects was demonstrated by the many converts (both political and religious) who embraced the new ethic of voluntarism. The melding of voluntarism with

the power of words connected moral accountability to language, and language to political legitimacy. Such a union reinscribed (and reconfigured) the connections between religious and political structures. As the historian Gordon Wood stated recently, sympathetic identification in the early Republic was "not simply an instrument for constructing a national identity; it was as well as means of national survival."[18]

Faith in the power of language, however, was also a key to the embrace of verbal challenges to Christianity itself, and the thrilling conviction of the vulnerability of authority to words of power. Belief in the efficacy of words explains not only the commitment to protect Christianity from verbal obloquy, but also the use of language as an effective means of attack. The conviction of the power of blasphemy, in short, enticed dissidents to use it. And dissidents there were, although nowhere near so many or so powerful as their opponents routinely claimed. By the turn of the nineteenth century, many evangelical Christians and their more orthodox counterparts battled the forces of unbelief, led by the "arch-infidel, the Virginia Voltaire," Thomas Jefferson, with "that filthy little atheist," Thomas Paine, close behind. Sermons and tracts on the "Triumph of Infidelity," and the "Dangers of our Country" to which unbelievers exposed the rest of the population, targeted a small but articulate tradition of freethought in America.[19]

"Infidelity" (originally a theological rather than a marital or sexual term) was less prevalent than its opponents claimed. Religious skepticism was nonetheless the most visible wing of a more broadly based anti-clericalism in revolutionary America and beyond. Deeply suspicious of an "evangelical juggernaut," for example, Jefferson refused while president to follow the Federalist tradition of proclaiming fast and thanksgiving days. As late as 1830, Senator Richard Johnson of Kentucky, chairman of the Senate Committee on the Post Office, accused opponents of Sunday mail of "religious despotism." Believing Christians responded that this secularism and the lack of belief (or just apathy) that presumptively accompanied it would sap the very essence of liberty. Without Christian virtue and restraint, they claimed, liberty would degenerate into licentiousness. To save Washington from Infidelity, and the West from degeneration into barbarism, clerics, legal theorists, and judges honed their appeal to the populace. They used the language of sensation to describe and decry freethought as sensationalism run amok, the sure source of national decay, implosion, oblivion.[20]

The decay they feared was frequently associated with sexual indul-

gence. The conflation of religious infidelity and sexual transgression, a familiar theme throughout the history of Christianity, solidified in a culture obsessed with sensational talk. The tension spawned by the indulgence of emotional arousal and its containment within the boundaries of Christian morality—the constant reference to sensation and intimacy, and the discipline of sexual restraint—created intense interest in stories of orgies and their godless participants. The righteous explored the boundaries of propriety and piety; they also satisfied the itch to probe the sexual consequences of religious lapse. A poem in a Philadelphia newspaper in 1803 played on the relationship between then President Jefferson's rumored atheism and his affair with his slave, Sally Hemings:

> Cease, cease old man, for soon you must,
> Your faithless cunning, pride, and lust,
> Which Death shall quickly level:
> Thy cobweb'd Bible ope again;
> Quit thy blaspheming crony, Paine,
> And think upon the Devil.
> Resume thy shells and butterflies,
> Thy beetle's heads, and lizard's thighs,
> The State no more controul:
> Thy tricks, with *sooty Sal* give o'er:
> Indulge thy body, Tom, no more;
> But try to save thy *soul*.[21]

Equally valuable to the campaign against atheism and attendant vices was Fanny Wright, called the "Red Harlot of Infidelity." Wright's "free love" philosophy (and sexual promiscuity) combined with her religious freethought, revealed her as the antithesis of respectability (figs. 1 and 2). Her example, especially, was one of sexual danger. Wright embodied the congruence of religious and sexual deviance. To her many opponents, "Fanny Wrightism," also linked with the "dissolution," "licentious books," and infidelity that precipitated the French Revolution, personified the political dangers of tolerating freethought.[22]

Tarring all skeptics with the free love brush, and free love in turn with the violence of the French Revolution, defenders of Christianity condemned whole swaths of the Enlightenment tradition. The "atheist" label, inaccurate as a description of Deists and freethinkers, was a strategically convenient epithet for denouncing skeptical inquiry. It also reflected what one scholar has called the "lack of a graduated nomenclature to describe the increasing degrees of skepticism." However overbroad the label, the tactic was by and large successful. By the

Figs. 1 and 2. Francis Wright's outspoken, public criticism of traditional religion and marriage made her infamous among Christian conservatives. Wright's lectures on free thought and free love challenged central tenets of Christian belief. One of her critics ridiculed her, picturing Wright lecturing not as a woman but as a goose, a "Downright Gabbler." Photographs reprinted with permission of *Library Company of Philadelphia.*

1830s the remnants of freethought hardly justified continued lambasting. The unrelenting barrage, however, resonated with "enormous anxiety that unrestrained passion lay just below the surface." Improper (nay, immoral) connections were all too predictable when beating hearts and passionate expression were the common coin of authentic experience. The human body, as the historian Robert Abzug has shown, had become "a physiological companion to the Bible" by the second quarter of the nineteenth century, and the cultivation of healthy bodies a means of embodying the Word. The relationship of the body to words of less elevated origins was also called into question. The ties between sexual morality and Christian belief acquired new urgency, as the power of words spiraled out of bounds.[23]

IV

By the 1830s American blasphemy law validated the theory that the liberty created by words of power could flourish only if shielded by law from corrosive licentiousness. Blasphemy prosecutions, although never common, were not as rare as some scholars have implied. In the early Republic, criminal punishment of verbal transgressions was deployed to suppress the dangers that flowed inevitably, so went the argument, from such dissension. Libel, slander, sedition, incitement to riot, and so on, were commonly explained as intrusions of disorder into social processes and governance that must be preserved to ensure the liberty of all citizens. Yet disorder there certainly was, as historians of the early Republic have documented across an array of political, legal, cultural, and social contexts. And the legal system tolerated a variety of challenges to traditional authority. Why then did blasphemers excite prosecutorial and judicial attention?

Blasphemy prosecutions created opportunities for judges and lawyers to adapt and invigorate the moral discipline that compensated for the excesses they believed were associated with the irresponsible exercise of freedom. Eminent jurists wrote lengthy and learned opinions justifying the existence and efficacy of blasphemy statutes. Widespread public support for such opinions, as well as their legal stature, place them at the center of antebellum theories of religion and law. The popularity of the *Ruggles* decision, for example, grew over time. Evangelicals, especially, frequently reprinted the opinion as a prooftext of the fundamental Christianity of their unruly Republic. The

overtly sexual nature of most blasphemers' challenge to Christian faith and doctrine confirmed the popular assumption that linguistic licentiousness meant the evaporation of all restraint, and that liberty must be distinguished from wanton indulgence.[24]

The elements of the crime of blasphemy included the open and malicious—calculated to offend and disturb the civil peace– reviling of God or Scripture. To sustain a conviction, the precise language as well as the wanton nature of its utterance must be proved. Statutes varied somewhat in the scope of punishment available to sentencing judges, but prosecution was always designed to send a message about the moral vigor of a republic, rather than the severity of its punishments. The symbolic value of such cases gave them weight in a legal culture searching for moral purchase.[25]

In 1824 a young man's club in Pittsburgh held a debate on the fallibility of the Bible. Abner Updegraph took the "con" position, arguing that the Bible was "fabulous," unfounded in truth. There is no record of which side won the debate, but local officials who prosecuted him for blasphemy took up Updegraph's challenge. On appeal from his conviction, Updegraph claimed that he had only maintained the fallibility of Scripture in compliance with the terms of the debate. His conviction, Updegraph maintained, rested on the misapprehension that he had transgressed the bounds of polite conversation or social decorum.[26]

Unlike Ruggles, Updegraph had not attacked the parentage of Jesus or the chastity of Mary. Sexual affront and sexual danger, Updegraph's lawyer implied, lay at the heart of the offense. Justice Thomas Duncan of the Pennsylvania Supreme Court was not persuaded. He denied that language that was not itself obscene was protected from indictment for a crime closely associated with overt and offensive sexual language. Open denial of the divine inspiration of the Bible, Duncan held, especially with the levity that pervaded Updegraph's club, would have swift and devastating consequences. Such transgression quickly established a "nursery of vice, a school of preparation to qualify young men for the gallows, and young women for the brothel." The slippery slope from linguistic transgression to political and sexual depravity meant that Updegraph could validly be punished.[27]

The connections among religious speech, sexual propriety, and political stability were visible, vulnerable, and vital in the court's analysis. Democracy itself was sustained by the kinetic relationship between traditional morality and republican virtue, with a vague yet indispensable

Christianity linking the two. In the court's view, free government depended on the integrity of religious mandates in individual lives, the eternal complement to the less potent commands of mortal governors. For if Christian principle no longer restrained young men, then "impiety and profanity must reach their acme with impunity, and every debating club might dedicate the club-room to the worship of the Goddess of Reason, and adore the deity in the person of a naked prostitute." The "cement of civil union" would corrode. Such debates were thus indelibly colored with transgression. The sensitivity of courts and legal commentators to the emotive power of words demonstrates how profoundly they believed in the connection between rhetorical obloquy and political reality. As the court put it in *Updegraph*, "the dangerous temporal consequences likely to proceed from the removal of religious and moral restraints [on speech]" justified punishment of blasphemy. *Updegraph* took its place alongside *Ruggles* as a pillar of American law. Until the 1940s, courts and casebooks routinely cited the law of blasphemy as a recognized and respectable body of jurisprudence.[28]

V

Blasphemy cases had not been without critics, however. Resistance to judicial power, especially the "foreign" and "undemocratic" common law, propelled the codification movement of the first half of the nineteenth century. Codifiers sought to limit the power of the judiciary by defining in legislation the doctrines that judges could use in deciding cases. At New York's Constitutional Convention in 1821 (to which Kent was a delegate, and spoke at length in defense of his decision in *Ruggles*), for example, Erastus Root reported that at least two indictments for blasphemy had been sustained by the courts of New York. He proposed the following amendment: "The judiciary shall not declare any particular religion, to be the law of the land; nor exclude any witness on account of his religious faith." After sustained debate, the amendment failed by a vote of 74 to 41. The popularity of decisions such as *Ruggles*, and the sense that the *de facto* establishment of "general" Christianity was essential to good order, community sentiment, and popular morality, disarmed many critics of the common law. The "Americanization" of English common law doctrine in cases such as *Ruggles* and *Updegraph* domesticated and democratized otherwise disturbingly amorphous judge-made law.[29]

Thomas Jefferson was a central figure in legal debate, as he was in the religious campaign against infidelity. Alarmed by the growing congruence between popular religious sensibilities and legal doctrine, Jefferson charged in 1824 that "the judges have usurped" the legislative powers "in their repeated decision, that Christianity is a part of the common law." Jefferson also claimed that judges had misinterpreted the common law, translating a decision in law French that rested on "antien scripture" as "holy" scripture, rather than the "ancient written laws of the church." Based on the first mistaken translation, Jefferson maintained, English judges had derived "authority for burning witches" and "all blasphemy and profaneness." Their American counterparts, he charged, "have piously avoided lifting the veil under which [the mistake] was shrouded."[30]

The indictment of Thomas Jefferson Chandler for blasphemy in 1836 gave Chief Justice John Clayton of Delaware an opportunity to refute the first Thomas Jefferson. Clayton took up the task only "because respectable counsel have cited" Jefferson, who, Clayton believed, had violated the canons of legal writing. Like the blasphemers he defended, Clayton charged, Jefferson had engaged in vituperation rather than measured prose. Contrary to established mores of jurisprudence, Jefferson had transgressed the norm that required he write as "a grave jurist who feels respect for the memory of the eminent lawyers of England, because he knows and can appreciate their worth." Moreover, Clayton maintained, Jefferson was wrong on the facts. The courts of England had never sustained an indictment "for a mere sin against God," but only for subversion of "the very foundation on which *civil* society rested" through "wantonly and maliciously blaspheming."[31] Liberty as well as morality and social order were dependent on protection against the denigration of the religion of the people of the country, Clayton wrote. The mutual dependence of religious and social order was demonstrated by "the tears and blood of revolutionary France during that reign of terror, when infidelity triumphed and the abrogation of the christian faith was succeeded by the worship of the goddess of reason." The cautionary lesson of France, Clayton concluded, was the proof of the claim that "without [the Christian] religion no nation has ever yet continued free."[32]

Supreme Court Justice Joseph Story also challenged Jefferson (fig. 3). An eminent treatise-writer in his own right, Story condemned Jefferson's argument as an attempt "to contradict all history." In Story's analysis the national union, as well as state governments, liberty, and

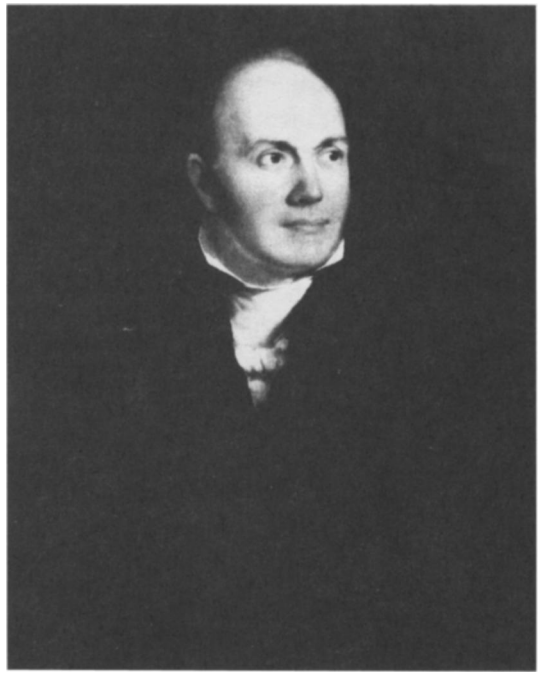

Fig. 3. Joseph Story's opinion in the *Girard Will* case reassured American Christians that respect for their religious beliefs was central to the legal system. However, Story also concluded that respect for individual belief and the centrality of the Bible did not necessarily require the presence of clergy, as every American had access to the Word. Photograph reprinted with permission of the Massachusetts Historical Society.

social order depended on Christian principles memorialized and applied through law. Yet Story was as far from endorsing a formal union of church and state as he was from advocating a separation of religious principles from government. "[T]o exclude all rivalry among Christian sects," Story maintained, was the goal of toleration. But to leap as Jefferson did from institutional disentanglement to "countenance, much less to advance mohametanism, or Judaism, or infidelity, by prostrating Christianity," was to confuse respect for individual conscience with an inability to protect the state from the degeneration of liberty into license. Such a confusion, Story predicted, would provoke "universal disapprobation, if not universal indignation." The distinction between protection of private Christian belief and punishment of licentious action was the linchpin on which the moral foundation of the

republic relied. Jefferson's attempted erosion of the distinction, Story argued, was fundamentally inconsistent with republican government.[33]

Chief Judge Lemuel Shaw of the Supreme Judicial Court of Massachusetts explained in 1838 that the statutory prohibition of blasphemy was "not intended to prevent or restrain the formation of any opinions or the profession of any religious sentiments whatever, but to restrain and punish acts which have a tendency to disturb the public peace." All of law, and "the existence of free government," Shaw stressed, depended on treating such acts "committed by the use of language" as offenses against the commonweal. By the time Shaw sustained freethinker Abner Kneeland's blasphemy conviction in the late 1830s, of course, the hurdles to prosecution of blasphemy in a disestablished state had been overcome. Most states had blasphemy statutes; appellate judges sustained convictions for blasphemy as well as lesser included offenses, such as cursing, swearing, violation of the Sabbath and disturbance of worship, and, of course, obscenity. Vanquished and vanishing, freethinkers gradually became objects of condescension and gentle derision.[34]

VI

The legal and political campaign against infidelity, ostensibly undertaken as a defense of Christian scripture and institutions, was finally fought not on theological or doctrinal grounds, but on popular morality and law. And there it was won. "General doctrines of Christianity" drove infidels out of respectable discussion and into the back alleys. By 1840, to be identified with Kneeland and his ilk was to be "unpopular," "immoral," "un-American."[35]

By mid-century the juridical and political space between religion and morality was gossamer-thin. So tightly were human and divine governance allied, as one scholar put it, that although "[m]oral law still came from God, . . . finding it out became a matter of observation and reason." In this view, religion was hardly the fear of a mystical, incomprehensible God, but a system of practical precepts for navigation through life. Human systems and human values became the barometer of natural law (and natural morality). Conversely, God's morality, especially His compassion toward human suffering, tied divine moral nature firmly to this-worldly issues. Lyman Beecher assured his parishioners that the Bible contained an accessible "code," the articulation of the "laws of a moral government."[36]

The blossoming of reform movements in the second quarter of the nineteenth century plunged believers into the work of moral regeneration at material levels. Such work frequently had explicitly social and political aims—the abolition of prostitution, slavery, alcohol, or Sunday delivery of the mail. The intimate connections between such moral respectability and a market economy were obvious to dissenters. In the late 1820s and 1830s, Abner Kneeland exploited and probed the ethic of respectability, especially the link between private property and sexual propriety (fig. 4). Language (and the Word) was once again effective means of subversion, as Kneeland found at the reception of the parody, the "Bible of Reason," and his pamphlets advocating birth control and the abolition of private property. Exploring thinly veiled connections between faith, morality and prosperity, Kneeland touched raw nerves.[37]

"Decent" and "serious" discussion of virtually all religious questions, including the divinity of Jesus and the existence of God, responded jurists and clerics, was fully protected by constitutional provisions for freedom of conscience. "Wanton" and "profane" scoffing was not. Each citizen was responsible for the self-control that freedom demanded. The 1830s married democratization of language and religious expression to an ethic of self-discipline, self-restraint, and self-improvement. The overlap between such discipline and success in an increasingly market-driven economy made sense to self-making Americans. Traditionally described by labels such as "bourgeois," or the less ideologically charged "middle-class," the structures of democratic capitalism and those of voluntaristic Protestantism formed a powerful alloy. The rhetoric of "decency" and "seriousness" (as opposed to the wild abandon of atheists and Jacobins) reflected a culture of personal responsibility for prosperity as well as salvation. More nuanced than a standard economic determinist interpretation, voluntarism in this multi-layered sense carried significant emotional rewards, as well as mandates for competitive behavior. Convinced of their ability to communicate across vast differences of age, sex, race (in some instances), social condition, and even geographical location, evangelicals implied an essential commonality among all people. Implicitly (and, when challenged, explicitly) Christian voluntarism held that any theory based on fundamental opposition between people was unchristian. To be Christian was to be morally responsible, and to expect the same from everyone else.[38]

From such an ethic came not only saving faith, but also savings accounts. For example, Kneeland's opponents claimed that his blas-

Fig. 4. Abner Kneeland, indicted for blasphemy in 1834, began his career as a Universalist minister. Abandoning what he derisively called "supernaturalism," Kneeland led the First Society of Free Enquirers and edited the *Boston Investigator* with Frances Wright. His speaking tours and weekly meetings at Julien Hall in Boston often drew large crowds to hear Kneeland's attacks on biblical faith, social privilege, and sexual inequality (and inhibitions). Photograph reprinted with permission of *Collection of the New-York Historical Society.*

phemy was evident in the "immense editions of atheistical works printed at the various infidel presses, and sold dog cheap" to working-class followers, as much as in his challenge to the being of God. Kneeland's design, according to his critics, was to "sow discord between the various classes of the community [exciting the] passions of the poor against the rich." Kneeland's crime included the "seduction" and moral degradation of workers of both sexes, accomplished through attacks on law as a tool of the rich in the oppression of the poor and marriage as a hoax designed to restrict sexual pleasure.[39]

The horror of "class" division in a society in which law was ostensibly the instrument of the sovereign "people" and the emotional experience of religion open to all was a defense of the imagined unity of Americans in a common patriotic faith. The division of this society into classes was to confuse the issue, claimed opponents such as John Barton Derby. Kneeland's crime, in this perspective, was "a lava stream of blasphemy which . . . gangrenes the very soul of uncorrupted reader[s]," misleading them and tempting them to hate the rich and revile God at the same time. The Christian patriotism that rested on notions of unity within diversity and notions of common cause in competition and personal responsibility was the direct target of Kneeland's "moral and *political* poison," as one of his detractors put it. Predictably, Kneeland's newspaper the *Investigator* attacked private property as well as the Bible, chastity as well as law.[40]

Bound up in the atheistical bundle were communism, adultery, and sedition, cast abroad, according to his prosecutors, in language that seduced an audience accustomed to respond to the power of words. To reject linguistic restraint was to embrace sexual deviance and legal chaos, as one court put it:

> [I]f the argument be worth anything, all the laws which have Christianity for their object—all would be carried away at one fell swoop—the act against cursing and swearing, and breach of the Lord's day; the act forbidding incestuous marriages, perjury by taking a false oath upon the book, fornication and adultery, *et peccatum illud horribile non nominandum inter Christianos*—for all these are founded upon Christianity.

The links between linguistic restraint and sexual order, freedom and the punishment of deviance, religion and legal structure, were clearly exposed.[41]

Responding to the threat to marriage and property as well as faith, prosecutors indicted Kneeland for blasphemy. Shaw rejected Kneeland's

appeal, applying the doctrines that had for decades punished licentiousness in the interests of Christian democracy. By 1840, it was clear that the Christian morality of the people sustained the punishment of blasphemers against defenses based on religious liberty, and that the same morality infused American law and politics with cosmic significance. This identification of law and morality with Christianity yoked law (and by implication lawyers and judges) to the practical implementation of God's moral law on earth. The Word required immersion in the world; good government enacted the will of God, coloring those who resisted reformation with the distinctive tint of anti-Christianity. The protection of the Word against vulgar and obscene words was also a means of hoisting the law out unfeeling technicality and desiccated formalism. In the landmark *Ruggles* case, for example, Chancellor Kent translated law into a distilled essence of democracy, the will of the people rendered into legal language. Replacing the authoritarian justification for blasphemy prosecutions in Britain, Kent and other antebellum jurists invoked the common sense of the people to create a majoritarian framework for the punishment of blasphemy.[42]

The "general doctrines of Christianity" protected in blasphemy jurisprudence also elevated legists into enforcers of Christian doctrine. Individual judges were empowered to determine and then to protect the unifying principles of general Christianity. Thus the legal system tended the widening influence of Christian communication in the early Republic. It allowed judges and lawyers to construe the law of religious liberty as consistent with the common sense of Americans, and both with common morality.[43]

The courtroom performances of lawyers, whose oratory often drew large crowds, also invigorated the legal system in a culture that thrived on the dramatic witness of Christian evangelists. By the second quarter of the nineteenth century, to please the crowd was to appeal to its finely tuned sensibilities, grounded in religious feeling. Daniel Webster, for example, played shamelessly to the spectators attending a packed Supreme Court argument in the *Girard Will* case in 1844 (fig. 5). Attacking a bequest to establish a school in Philadelphia at which no minister was allowed to teach, Webster claimed that "there can be no charity where the authority of God is derided and his word rejected." Relying on blasphemy decisions, Webster argued that the will must fail because Christianity was part of the law of Pennsylvania. The audience was captivated by Webster's eloquence, and there was speculation that his argument

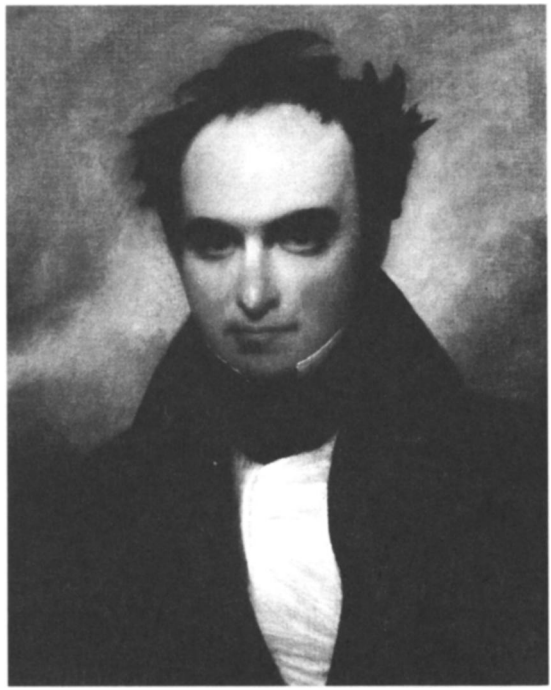

Fig. 5. Daniel Webster, perhaps the best-known litigator in antebellum America, appealed to popular religious beliefs when he argued that Christianity was part of the common law. Famous in part for his ability to persuade his listeners with dramatic argument, Webster drew on and fed into the emotional sensibilities of his audience. Photograph courtesy of Dartmouth University.

(which skimmed over dry precedent, and focused on the religious sensibilities of the people) was motivated less by defeating the will of the infidel Frenchman Girard than by his own presidential ambitions.[44]

Justice Joseph Story held against Webster, but not because the law countenanced "the establishment of a school or college, for the propagation of Judaism, or Deism, or any other form of infidelity." The exclusion of clerics, Story reasoned, did not imply the exclusion of Christianity in its "general" form: "What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay-teachers?" The will directed that students be instructed in "morality." As Story saw it, all morality owed its origin to Christianity. The will could not in the final analysis be construed as anti-Christian. The authority of clerics was not necessary

when all Christians were equal before the Word. Anything less, Story wrote, approvingly citing *Updegraph*, would compromise the "complete protection of every variety of religious opinion." Chancellor Kent wrote to Story, praising the opinion's reasoning and result.[45]

By 1844, then, the Supreme Court had endorsed a blasphemy jurisprudence based on the voluntarism of individual engagement with the Word and the democratic inclinations of the people. So perfect was the relationship between jurisprudence and Christian faith, gloated one lawyer, that "from a Law Library may be arranged as complete a Code of Morals, and as perfect a Creed of Christian Faith, as would be satisfactory to the most exacting Professor of Religion, or the most orthodox Christian Church; therefore no Lawyer properly imbued with the teachings of his Profession, *can* be an Infidel or a Skeptic." By the late 1830s, liberal Protestants and liberal jurisprudes boasted that America was an extraordinarily "Christian" nation. They credited democratic principles for the virtually simultaneous disentanglement of churches from political institutions and attributed to such voluntaristic structures the doctrines of "general Christianity" that were so useful in the management of dissent. Therefore the duty of the Christian patriot was to inhabit and protect the moral space between institutional church tyranny and anarchical anti-Christianity. True respectability flowed from respect for such boundaries in life and law, safeguarding both Christian belief and the social structures that flowed from popular religious morality.[46]

VII

The early nineteenth-century world of legal meaning and legal interpretation is in many respects foreign to the legal world of the present. Federal constitutional analysis has overwhelmed much of the territory formerly occupied by state constitutional jurisprudence. The law of blasphemy has atrophied, discredited if not actually excised from criminal codes. But federal constitutional jurisprudence of the late nineteenth and twentieth centuries had roots deep in the soil of antebellum state decisions. Doctrines developed in state law migrated into federal cases. The migration occurred not in blasphemy cases, which were understood as properly within state jurisdiction until well into the twentieth century, but in the only battle over religious liberty to take place at the federal level in the second half of the nineteenth century. In federal courts, the focus was on polygamy, especially in Utah Territory,

but also in surrounding jurisdictions. The United States Supreme Court reconstructed concepts developed in the states before the Civil War, adapting traditional doctrines to suit new forms of dissent.[47]

Deists and freethinkers in America had lost decisively on the question of a Christian God's existence and involvement with the world. But by the middle decades of the nineteenth century, new dissidents found other venues for dissent. Especially in religiously driven challenges to Christian marriage and sexual propriety in the 1840s and beyond, members of new sects required the reconstruction of the jurisprudence of religious liberty. Claiming divine sanction, dissenters frequently embraced sexual re-ordering as their central focus. They challenged the most visible institutional structure through which wealth, emotional fulfillment and religious meaning were sought by participants and transmitted to succeeding generations; that is, marriage. As sexual morality was thrown into sharp relief, marriage acquired added weight—psychic, cultural and legal—and (by virtue of its new visibility) increased vulnerability.[48]

Lawyers and legal theorists recognized the connection. In his landmark treatise *Constitutional Limitations*, first published in 1868, Thomas Cooley of the Michigan Supreme Court explained in a chapter entitled "Religious Liberty" that Christianity was part of positive state law "for certain purposes." Christianity governed the laws "which relate to the family and social relations," including the permanence of marriage, the prohibition of polygamy, and the support due from a husband to his wife, and, of course, for the prohibition of blasphemy. That dissidents would attack the family and social relations based on the Christian morality outlined in blasphemy cases and summarized by Cooley was no surprise to their opponents. As Samuel Gridley Howe put it, Abner Kneeland's attack on Christianity "g[ave] full play to licentious indulgence, and shew[ed] the young how to avoid its natural penalties." The inevitable consequence would be the seduction of "wives from husbands." The threat from malcontents whose doctrines "abound[ed] with blasphemy, ribaldry, and obscenity" was tinged with attacks on marriage.[49]

The proliferation of sects reinforced and intensified theories of the overlap between religious conformity and sexual restraint. Among homegrown faiths, the Shakers and the Oneida Perfectionists espoused complete celibacy or a group-based (rather than exclusive) concept of marriage. To many Americans, the existence of such utopian groups was

evidence of substantial spiritual and social dislocation. "The fanatic is of logical necessity either an ascetic or a sensualist," one contemporary claimed. "[H]ealthy moderation is foreign alike to his speculative faith and social practice. He either gives full rein to his baser propensities under the specious name of 'Christian liberty,' or with a little more conscientiousness, swings to the opposite extreme and forbids those innocent gratifications prompted by nature and permitted by God."[50]

Such groups received their share of public criticism, yet none provoked such fear and loathing as the Church of Jesus Christ of Latter-day Saints, members of which are commonly called "Mormons." Mormons capitalized on the power of religious language to produce converts through a new and alternative revelation. They also challenged the sexual morality of monogamy—the marital exclusivity founded, as Chancellor Kent put it, "[directly] on the precepts of Christianity." Founder and first prophet Joseph Smith translated *The Book of Mormon*, an entirely new Scripture that placed America at the center of cosmology, from "golden plates" whose location was revealed to him in a vision. He also received a revelation outlining the divine law of "Celestial Marriage," commanding faithful Mormon men to marry multiple wives when called upon by the church to do so.[51]

To its opponents, Mormonism seemed an inverted version of the importance of the Word: emotional commitment to faith and sexual restraint in the interests of morality. Mormonism exposed the weakness of a system that relied on the self-sustaining vigor of a "general Christianity" surrounded by structures of mobility, democracy, and competition. These forces created the very potential for inversion in which Mormonism was born. That Mormonism was also patently successful added to the chagrin of anti-Mormons. Truly the greatest threat, lamented opponents, was not "the absence of Word but its perversion." In a culture saturated with biblical story telling, Latter-day Saints claimed that an entirely new bible meant that other Christian witness was "corrupt." The new story required rejection of the "war of words" between Christian evangelists and the acknowledgment that apostasy had characterized the Christian world for 1500 years, infecting it with hypocrisy and decay. The New Covenant contained in the *Book of Mormon* and subsequent revelations galvanized Smith and his followers to revision all of law and society, especially marriage.[52]

The challenge to legal authority posed by Mormon polygamy raised the stakes, for Mormons claimed a new dispensation that supplemented

and even superceded the Bible. Mormon pro-polygamists turned to the logic of a half-century of legal decisions to defend their New Covenant. Against the "general Christianity" arguments of Protestants, the Saints anted up their own divine law. Furthermore, Mormons recognized that voluntarism (if truly based on democratic principle) would allow the majority of a state or territory to create an alternative legal structure. In Utah, they claimed, there was nothing "illegal" about polygamy or other aspects of Mormon practice. The legal treatment of Mormons by the federal government in the second half of the nineteenth century, however, demonstrated the adaptability of state constitutional doctrines, as well as the conviction of their opponents that Mormons posed a threat comparable to that of freethinkers in the antebellum period.[53]

To those familiar with state blasphemy jurisprudence, the strategy for dealing with Mormon polygamy was also contained in the case law. Blasphemy doctrine, after all, was a proven mechanism for the management of religious dissent. In 1879 the United States Supreme Court, upholding the criminal conviction of Mormon polygamist George Reynolds, held that marriage was a "sacred obligation," but one that was recognized and "regulated by law." As the court stressed, citing Kent's *Commentaries on American Law*, polygamy (like blasphemy) had always been prohibited by the common law. Religious liberty in the United States complicated the analysis, perhaps, but as state courts had shown, the liberty protected by constitutional provisions was liberty of conscience, not of behavior. The act of marrying a second wife (like the act of vilifying the gospels in earlier state cases) took Reynolds outside the protected realm of belief. Like the constitutions of the states, wrote Chief Justice Morrison Waite, the federal religion clauses deprived Congress "of all power over mere opinion" but left it "free to reach actions which were in violation of social duties or subversive of good order." Religious liberty in the first polygamy case—as in *Kneeland*, *Updegraph* and *Ruggles*—was bounded (and shielded) by the punishment of license. The belief-action distinction migrated from state blasphemy law to federal polygamy cases. And so commenced the federal constitutional jurisprudence of church and state with *Reynolds v. United States*, resting firmly on the principle that the common law and Christian faith were central to American law and culture.[54]

Even more closely tied to the tradition of punishing anti-Christian speech was the Supreme Court's opinion in *Davis v. Beason*, decided in 1890. Samuel Davis was indicted in Oklahoma Territory for conspiring

to swear that he did not belong to an organization that counseled its "devotees" "to commit the crime of . . . polygamy." Members of such "sects," according to a territorial statute, were prohibited from voting or holding public office, and all voters were required to swear they did not belong to such groups. Justice Stephen Field, writing for the court, held that "there can be no serious discussion or difference of opinion" about the "pernicious" qualities of polygamy, which violated the "laws of all civilized and Christian countries." The theory that some forms of belief were so outrageous that their advocacy virtually replicated the political and social dangers of blasphemy (that is, that there was no possibility of "serious discussion" associated with such beliefs) highlights the Supreme Court's incorporation of a second doctrinal distinction associated with liberty and license in state court jurisprudence. The rhetoric of seriousness and decency had long been central to state courts' analysis in blasphemy cases.[55]

The problem of language and the relationship of religious expression to political legitimacy had come full circle in *Davis*, however. Samuel Davis's crime was conspiracy—the intention to undermine the validity of the oath. According to his prosecutors, Davis's propensity to lie was predicated on a belief system fundamentally at odds with Christian notions of punishment, especially for false swearing. The validity of oaths, of course, had been a concern of American law in general and blasphemy jurisprudence in particular. As the Pennsylvania Supreme Court put it in the 1824 *Updegraph* case, failure to punish blasphemers would destroy the legal system itself, paving the way for "perjury by taking a false oath upon the book, fornication, and adultery." From this perspective, polygamy and subornation of perjury were the predictable results of Latter-day Saints' claim to a new religious dispensation. State court judges had held in blasphemy cases that the perversion of the Word entailed the destruction of democracy. Justice Field deployed this logic to hold that Davis and other Mormons would abuse the democratic privilege of political expression to undermine liberty itself. To preserve freedom, Field stressed, advocates of polygamy must not be allowed to "defeat the criminal laws of the country" by their votes. Political legitimacy was contingent, in his view, on respect for "holy matrimony." Marriage unified Christian moral structure and civic responsibility; it was the "source of all beneficent progress in social and political improvement." To drive home the connection between protection of liberty and punishment of license, and the Supreme

Court's debt to state constitutional law, Field also quoted the provision of the New York Constitution that sustained the punishment of blasphemy in *Ruggles*: "the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness." Similar provisions in other state constitutions made it plain that liberty had never been understood as a shield for deviance by a religious minority.[56]

Yet there was also a fundamentally anti-majoritarian logic inherent in the *Davis* opinion that was not present in antebellum jurisprudence. As the Delaware Supreme Court emphasized in the *Chandler* case, the punishment of blasphemy rested on the embrace of Christianity as the religion of the majority: the people have "a full and perfect constitutional right to change their religion as often as they see fit." Majority rule justified the punishment of blasphemers in *Chandler*, as in other state cases. The decision in *Davis* precluded just such an alteration, however, on the theory that the moral difference of Mormonism was evidence of the perversion of democracy. From its basis in demographic factors,[57] to a democratic doctrine,[58] religious liberty at the Supreme Court had been so limited as to preclude even a locally driven democratic alteration in the law. The hardening moral lines of constitutional jurisprudence translated the prescriptive nature of "general Christianity" from a basic fact of American legal culture before the Civil War, into a constitutional code by 1890.[59]

VIII

The fact that blasphemy jurisprudence is presently obscure owes much to the changing preoccupations of many twentieth-century constitutional lawyers. In contrast to their nineteenth-century predecessors, their focus shifted from language as a positive source of political and religious meaning to a more libertarian embrace of freedom of expression as an end in itself. If tolerance of vituperative or obscene words is theorized as a positive good from a constitutional perspective, then the legal past acquires a repressive cast, its reasoning misguided and counterproductive, uninteresting except to catalogue and distance the abuse. Situating blasphemy jurisprudence (and blasphemers) in their appropriate legal and religious settings, however, reveals that the punishment of destructive words was understood as the means of protecting constitutive words.

Unearthing earlier connections between religious speech, democratic theory, and sexual relations reveals why jurists crafted a rich vein of

blasphemy case law and commentary and how the doctrines they articulated in blasphemy cases were imported into federal constitutional analysis. One often ponders the dearth of "great" speech cases in the first half of the nineteenth century. Blasphemy jurisprudence reveals that there were indeed such great cases but that they were decided on the grounds closest to the central concerns of those involved in them. They were decided, that is, as cases about religious liberty.[60]

NOTES

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1. 8 Johns. 290, 291, 293 (1811) (emphasis in original) citing Rex v. Wollston, Str. 834; Fitzg. 64. Ruggles spoke at the door of a tavern where he had been drinking heavily. His punishment was a "stiff fine," which he paid and "vanished thereupon from history." Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (New York: Harcourt, Brace and World, 1965), 66. For a detailed account of blasphemy doctrine in England to the 1920s and the claim that blasphemy prosecutions were not maintained by civil courts until the early eighteenth century, only becoming (relatively) frequent between 1790–1830, see Courtney Stanhope Kenny, "The Evolution of the Law of Blasphemy," *Cambridge Law Journal* 1 (1922), 127, 131–34. See also R.W. Lee, "The Law of Blasphemy," *Michigan Law Review* 16 (1918), 149.

2. 8 Johns., 293. Before the decision in Ruggles, American commentators assumed that blasphemy could validly be punished without exploring the hurdles created by disestablishment and religious freedom. Zephaniah Swift, *A System of the Laws of the State Of Connecticut*, vol. 2 (Windham, Conn.: John Byrne, 1795), 321; James Wilson, *The Works of James Wilson*, Bird Wilson, ed., vol. 2 (Philadelphia, Pa.: Lorenzo Press, 1804), 425.

3. For scholarship that dismisses or condemns the law of blasphemy, see, e.g., Stuart Banner, "When Christianity Was Part of the Common Law," *Law and History Review* 16 (spring 1998): 23; Leonard M. Levy, *Blasphemy: Verbal Offense Against the Sacred from Moses to Salman Rushdie* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1993), 400–24. Blasphemy has attracted able literary criticism in recent years. David A. Lawton, *Blasphemy* (Philadelphia, Pa.: Univ. of Pennsylvania Press, 1993); Joss Marsh, *Word Crimes: Blasphemy, Culture and Literature in Nineteenth-Century England* (Chicago: Univ. of Chicago Press, 1998). Eighteenth-century blasphemy has also received thoughtful attention. See Carl Gardena Pestana, "The Social World of Salem: William King's 1681 Blasphemy Trial," *American Quarterly* 41 (June 1989): 308–27.

4. Employment Division v. Smith, 494 U.S. 872, 882 (1990). For a pointed critique of when and whether actions motivated by religious belief should receive constitutional protection, see Justice Sandra Day O'Connor's concurrence in the same case. 494 U.S. at 890.

5. This connection has been noted → Robert Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment," *California Law Review* 76 (Mar. 1988): 297–335. See also Rochelle Gurstein, *The Repeal of Reticence: A History of America's Cultural and Legal Struggles over Free Speech, Obscenity, Sexual Liberation, and Modern Art* (New York: Hill and Wang, 1996), 179–212.

6. 8 Johns., 294–97. See also William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1996), esp. 10. For an analysis of the concept of "the sovereign people" in antebellum political rhetoric, see Daniel T. Rodgers, "The People," chap. three in *Contested Truths: Keywords in American Politics Since Independence* (New York: Basic Books, 1987), 80.

7. 8 Johns., 296. Article XXXVIII, New York Constitution, 1777. On the distinction between liberty and licentiousness, → Gordon, "'The Liberty of Self-Degradation': Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America," *Journal of American History* 83 (Dec. 1996), 815, 817–23.

8. 8 Johns., 298. Washington's Farewell Address is quoted at length in Robert N. Bellah, "Civil Religion in America," *Daedalus* 96 (winter 1967): 1, 6.

9. Updegraph v. Commonwealth, 11 Serge. & Rawl. 393, 406 (1824). Ruggles, 8 Johns. 290, 295 (1811). The key difference between the new United States and all other "Christian" nations, of course, was the prevalence of disestablishment. For much of the nineteenth century, Americans struggled to explain to Europeans how a disestablished nation could function, and equally important, how it could maintain an essentially Christian sensibility. See, e.g., Benjamin F. Morris, *The Christian Life and Character of the Civil Institutions of the United States* (Philadelphia: George W. Childs, 1864)

10. According to H. Frank Way, "The Death of the Christian Nation: The Judiciary and Church-State Relations," *Journal of Church and State* 29 (autumn 1987): 509–10. There were twenty-two reported blasphemy decisions between 1800 and 1920. This number, of course, does not represent the number of prosecutions, only those that resulted in reported judicial opinions, "generally by the state's highest court." The actual number of blasphemy prosecutions is likely to be many times the number of reported state supreme court opinions. And while it would certainly be interesting to know the precise scope of legal enforcement, this article focuses not so much on the number of cases as on their jurisprudential significance. See generally Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early America* (Cambridge, Mass.: Harvard Univ. Press, 1960); Thomas Starkie, *A Treatise on the Law of Slander and Libel, and Incidentally of Malicious Prosecutions*, 2 vols. (West Brookfield, Mass.: O.S. Cooke, 1852).

Disestablishment, of course, distinguishes American from English law. There is another important difference that bears noting here, however; in England, private citizens could (and can to this day) initiate blasphemy prosecutions. This private prosecutorial power may substantially explain the far greater number of prosecutions in England in the nineteenth century. See Marsh, *Word Crimes*, 229. In American jurisdictions, blasphemy statutes mandate that cases begin with the government. Furthermore, blasphemy was (and is, technically, in the many jurisdictions that still have blasphemy statutes in their criminal codes) a statutory rather than a common law offense. Although Chancellor Kent in the Ruggles case sustained a common law indictment, there was a colonial blasphemy statute in New York that could most likely have been invoked to indict John Ruggles. Whether or not the earlier statute was still valid, the New York legislature, validating the result in the case, enacted positive blasphemy legislation shortly after Kent's opinion was handed down. *Laws of the State of New-York*, 2:195 (1813); cf. Banner, "When Christianity Was Part of the Common Law," 34.

Elizabeth B. Clark, "'The Sacred Rights of the Weak': Pain, Sympathy, and the Culture of Individual Rights in Antebellum America," *Journal of American History* 82 (Sept. 1995), 463, 475–81; Ann Braude, *Radical Spirits: Spiritualism and Women's Rights in Nineteenth-Century America* (Boston: Beacon Press, 1989), 34–43; David S. Reynolds, "From Doctrine to Narrative: The Rise of Pulpit Storytelling in America," *American Quarterly* 32 (winter 1980): 479. The shift was not the invention of nineteenth-century revivalists but was built on traditions of communication and religious feeling that can be traced at least to the mid-eighteenth century. See generally, Sandra S. Sizer, *Gospel Hymns and Social Religion: The Rhetoric of Nineteenth-Century Revivalism* (Philadelphia, Pa.: Univ. of Pennsylvania Press, 1978); David S. Lovejoy, *Religious Enthusiasm in the New World: Heresy to Revolution* (Cambridge, Mass.: Harvard Univ. Press, 1985); John Mullan, *Sentiment and Sociability: The Language of Feeling in the Eighteenth Century* (New York: Oxford Univ. Press, 1988); Daniel Walker Howe, *The Unitarian Conscience: Harvard Moral Philosophy, 1805–1861* (Cambridge, Mass.: Harvard Univ. Press, 1970); Harry S. Stout, *The Divine Dramatist: George Whitefield and the Rise of Modern Evangelicalism* (Grand Rapids, Mich.: W.B. Eardmans, 1991).

12. On narrative strategies in popular literature, see Ann Douglas, *The Feminization of American Culture* (New York: Knopf, 1977); Jane Tompkins, *Sensational Designs: The Cultural Work of American Fiction, 1790–1860* (New York: Oxford Univ. Press, 1985); Philip Fisher, *Hard Facts: Setting and Form in the American Novel* (New York: Oxford Univ. Press, 1985); David S. Reynolds, *Faith in Fiction: The Emergence of Religious Literature in America* (Cambridge, Mass.: Harvard Univ. Press, 1981). For legal storytelling, see Daniel A. Cohen, "Trials and Tribulations: The Literature of Legal Romanticism," chap. 4 in *Pillars of Salt, Monuments of Grace: New England Crime Literature and the Origins of American Popular Culture, 1674–1860* (New York, 1993), 83–100; Sarah Barringer Gordon, "Our National Hearthstone: Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America," *Yale Journal of Law & the Humanities* 8 (summer 1996): 295. For the quoted language, see Charles Grandison Finney, *Lectures on Revivals of Religion* (1835; Cambridge, Mass.: Belknap, 1960), 34, 82, qtd. in Clark, "The Sacred Rights of the Weak," 479; Henry Steele Commager, *The American Mind* (New Haven, Conn.: Yale Univ. Press, 1950), 165.

13. For the argument that competition characterizes American religion as much as politics and that both religious leaders and politicians have been bound together by competitive processes, the contours of which first became apparent in the early nineteenth century, see Moore, "The Parallel Rise of Churches and Political Parties," chap. 3 in *Selling God*. For analysis of this process from a strikingly different perspective, see Nathan O. Hatch, *The Democratization of American Christianity* (New Haven, Conn.: Yale Univ. Press, 1989). On Finney, see Keith Hardman, *Charles Grandison Finney, 1792–1875: Revivalist and Reformer* (Syracuse, N.Y.: Syracuse Univ. Press, 1987); Lewis A. Drummond, *Charles Grandison Finney and the Birth of Modern Evangelism* (London: Hodder and Stoughton, 1983); William G. McLoughlin, "Charles Grandison Finney: The Revivalist as Cultural Hero," *Journal of American Culture* 5 (summer 1982): 80.

14. Robert H. Abzug, *Cosmos Crumbling: American Reform and the Religious Imagination* (New York, 1994), 20–29, on "Christian Republicanism," exemplified by Benjamin Rush; Marty, *The Infidel*, 191; Gordon Wood, ed., *The Rising Glory of America, 1760–1820* (New York: G. Brazilier, 1971), 77. The quote is from Clark, "Anticlericalism and Antistatism," 16.

15. Robert Baird, *Religion in America* (New York: Harper, 1845), 283, quoting Hon. Henry Wheaton, at 254.

16. Packard is quoted in Miller, *Life of the Mind*, 43. On Packard, see "Alpheus Spring Packard," *Dictionary of American Biography*, vol. 14 (New York: C. Scribner, 1934), 125. Baird. *Religion in America*, 254; Donald G. Mathews, "The Second Great Awakening as an Organizing Process, 1780–1830: An Hypothesis," *American Quarterly* 21 (spring 1969): 43. On the political influence of religion, see R. Laurence Moore, "The End of Religious Establishment and the Beginning of Religious Politics: Church and State in the United States," in Thomas Kselman, ed., *Belief in History: Innovative Approaches to European and American Religion* (Notre Dame, Ill.; Notre Dame Univ. Press, 1991), 237.

17. Lawton, *Blasphemy*, 6. This insight challenges the claim of historian Leonard Levy that "[w]here organized religion exists, blasphemy is taboo. Thus, monotheistic religions have no monopoly on the concept of blasphemy." Levy, *Blasphemy*, 3. For the Protestant reconstruction of "Christian liberty," see Sheldon Wolin, *Politics and Vision*, 274; Clark, "Anticlericalism and Antistatism," 8; Levy, *Blasphemy*, 58–74.

18. Nancy Isenberg, *Sex and Citizenship in Antebellum America* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1998), 80–82. On the importance of religious language in literary and political contexts, see Anne Norton, "The Word Made Flesh," chap 1 in *Alternative Americas: A Reading of American Political Culture* (Chicago: Univ. of Chicago Press, 1986), 19; Philip Gura, *The Wisdom of Words: Language, Theology, and Literature in the New England Renaissance* (Middletown, Conn.: Wesleyan Univ. Press, 1981), 15–71; Michael P. Kramer, *Imagining Language in America: From the Revolution to the Civil War* (Princeton, N.J.: Princeton Univ. Press, 1992), 137–61. The quoted language is from Gordon S. Wood, "The American Love Boat," *The New York Review of Books*, 7 Oct. 1999 (reviewing Andrew Burstein, *Sentimental Democracy: The Evolution of America's Romantic Self Image* [New York: Hill and Wang, 1999]).

19. A similar point has been made in connection with other forms of belief as influencing the available means of rebellion. The most obvious example is that of witchcraft, a practice condemned by Cotton Mather as "rebellion against God" and the inversion of faith—incantation rather than prayer. On witchcraft beliefs and punishment in colonial America, → Elizabeth Reis, "The Salem Witchcraft Trials: A Legal History," *Journal of American History* 85 (Sept. 1998): 652; John Putnam Demos, *Entertaining Satan: Witchcraft and the Culture of Early New England* (New York: Oxford Univ. Press, 1982); Carol F. Karlsen, *The Devil in the Shape of a Woman: Witchcraft in Colonial New England* (New York: Norton, 1987); David Thomas Konig, *Law and Society in Puritan Massachusetts, 1629–1692* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1979). On infidelity, see Timothy Dwight, *The Triumph of Infidelity* (Hartford, Conn.: s.n., 1788); "The Dangers of our Country," *Christian Watchman*, 4 Dec. 1829, p. 195. On the virulent Federalist campaign against Jefferson as an advocate of atheism and Jacobinism, see Charles F. O'Brien, "The Religious Issue in the Presidential Campaign of 1800," *Essex Institute Historical Collections*, 107 (Jan. 1971): 82–93; Constance B. Schulz, "'Of Bigotry in Politics and Religion': Jefferson's Religion, the Federalist Press, and the Syllabus," *Virginia Magazine of History and Biography* 91 (Jan. 1993): 73–91. For an example of anti-Paine rhetoric, see W.B. Reed, "Life and Character of Thomas Paine," *The North American Review* 57 (July 1843): 1–58.

20. Fear of evangelical juggernauts is discussed in Daniel Walker Howe, "The Evangelical Movement and Political Culture in the North during the Second Party System," *Journal of American History* 77 (Mar. 1991), 1226. On Jefferson's practice, see Leo Pfeffer, *Church, State, and Freedom* (Boston: Deacon Press, 1953), 119–20. Richard M. Johnson, "Report . . . on the subject of mails on the Sabbath," 19 Jan. 1829, 20 Cong., 2 sess. *Senate Documents*, no. 46, 4. On the Sunday mail controversy, see

Bertram Wyatt-Brown, "Prelude to Abolitionism: Sabbatarian Politics and the Rise of the Second Party System," *Journal of American History* 58 (Sept. 1971): 316–41; James R. Rohrer, "Sunday Mails and the Church-State Theme in Jacksonian America," *Journal of the Early Republic* 7 (spring 1987): 53–74; Richard R. John, "Taking Sabbatarianism Seriously: The Postal System, the Sabbath, and the Transformation of American Political Culture," *Journal of the Early Republic* 10 (winter 1990): 517–67. On anti-Sabbatarianism, see Isenberg, *Sex and Citizenship*, 75–101. On the narrow understanding of religious liberty even among leading Federalists and Antifederalists who supported the disestablishment and free exercise clauses in the federal Constitution and who simultaneously maintained religious qualifications for office-holding and voting and compulsory taxation to support Protestant churches at the state level, see Morton Borden, "Federalists, Antifederalists, and Religious Freedom," *Journal of Church and State* 21 (autumn 1979): 469.

21. For analyses of fascination with forbidden forms of sexuality in their nineteenth-century incarnations, see Karen Halttunen, "Humanitarianism and the Pornography of Pain in Anglo-American Culture," *American Historical Review* 100 (Apr. 1995), 303; Cohen, *Pillars of Salt, Monuments of Grace*, 167–246. *Port Folio*, 22 Jan. 1803, repr. in Fawn M. Brodie, *Thomas Jefferson: An Intimate History* (New York: Norton, 1974), 361. For the most recent scholarly treatment of the affair, see Annette Gordon-Reed, *Thomas Jefferson and Sally Hemings: An American Controversy* (Charlottesville, Va.: Univ. of Virginia Press, 1997).

22. "Female Infidelity," in *Advocate of Moral Reform*, 1 Aug. 1836, qtd. in Lori D. Ginzberg, "'The Hearts of Your Readers Will Shudder': Fanny Wright, Infidelity, and American Freethought," *American Quarterly* 46 (June 1994), 195. Celia Morris Eckhardt, *Fanny Wright: Rebel in America* (Cambridge, Mass.: Harvard Univ. Press, 1984), 156; John C. Spurlock, *Free Love: Marriage and Middle-Class Radicalism in America* (New York: New York Univ. Press, 1988). *New York Commercial Advertiser*, 7 Nov. 1829, qtd. in Ginzberg, "The Hearts of Your Readers," 204. For claims of freethinkers' inherent depravity, immorality, criminality, and bloodthirsty political proclivities made by opponents of freethought, see the sources quoted in Albert Post, *Popular Freethought in America, 1825–1850* (New York: Columbia Univ. Press, 1943), 199–204.

23. Ginzberg, "The Hearts of Your Readers Will Shudder,'" 216. Abzug, *Cosmos Crumbling*, 164. The power of words had long troubled Protestants on the North American continent, of course. See, e.g., Jane Kamensky, *Governing the Tongue: The Political of Speech in Early New England* (New York: Oxford Univ. Press, 1997). The central differences that lie at the core of the problem after independence, however, including the spread of religious witness and emotional speechifying and new legal and political structures of authority, combined to place new stresses on language.

24. Miller, *Life of the Mind*, 66.

25. For a summary of the elements of the offense, see the extensive annotation in *American Law Reports* 14 (Rochester, N.Y., 1921), 880–89.

26. Updegraph v. Commonwealth, 11 Serg. & Rawl. 394 (1824).

27. Ibid., 398–99. Such debating clubs were contested ground in the second quarter of the nineteenth century as young men were urged to remain within the family circle to work for domestic and professional achievement rather than the fraternal jollity and the moral laxity such debating associations tolerated. See generally Mary P. Ryan, *Cradle of the Middle Class: The Family in Oneida Country, New York, 1790–1865* (Cambridge: Cambridge Univ. Press, 1981), 145–85; Paul E. Johnson, *A Shopkeeper's Millennium: Society and Revivals in Rochester, N.Y., 1815–1837* (New York: Hill and Wang, 1978), 116–41.

28. 11 Serge. & Rawl., 404. Updegraph's conviction was overturned on a legal technicality (the prosecutor did not include a quotation of the precise words that were the subject of the offense in the indictment), and he disappeared from the pages of the Pennsylvania court reports. For an example of the vigor of the law of blasphemy in the twentieth century, see State v. Mockus, 120 Maine 84 (1921).

29. *Records of the Convention of the State of New York* (1821), repr. in Charles Zebina Lincoln, ed., *Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905* vol. 1 (Rochester, N.Y.; The Lawyers co-operative Publishing Co., 1906), 462, 577. The "Americanization" label is drawn from the work of William Nelson. See *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, Mass.: Harvard Univ. Press, 1975), see esp. ch. 3, "The Law of a 'Civil and Christian State'" for an overview of prosecutions of offenses against morality and religion in the revolutionary era.

30. Letter to Major John Cartwright, 5 June 1824, in *The Writings of Thomas Jefferson*, Andrew A. Lipscomb, ed., vol. 26 (Washington, D.C.: Thomas Jefferson Memorial Association, 1904), 48. "Whether Christianity is a Part of the Common Law?" in *Jefferson's Reports on Virginia*, vol. 1 (Charlottesville, Va.: F. Carr, 1829), 137, 138, 142.

31. State v. Chandler, 2 Harr. 553, 557–58 (1837).

32. Ibid., 562.

33. Story to Edward Everett, 15 Sept. 1824, in William W. Story, ed., *Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University*, vol. 1 (Boston: C.C. Little and J. Brown, 1851), 430. Joseph Story, *Commentaries on the Constitution*, vol. 3 (Boston: Hilliard, Gray, 1833), 723–24, 728, sec. 1865–71. On Story's concept of the proper relationship between Christianity and the governments of the United States (state and federal), see McClellan, *Joseph Story and the American Constitution*, 118–59. I disagree here with Leonard Levy's conclusion on the same question. Levy maintains that a contrary decision—that punishment of blasphemy was contrary to religious liberty—was readily available to judges in the first half of the nineteenth century. Yet in his critique of Shaw's opinion in Kneeland, Levy could cite nothing written after 1786 to support his theory. Levy, *Blasphemy*, 422.

34. Commonwealth v. Kneeland, 20 Mass. 206, 213, 219, 221 (1838). This opinion, and Abner Kneeland himself, have received considerable attention from historians. See Leonard Levy, ed., *Blasphemy in Massachusetts: Freedom of Conscience and the Abner Kneeland Case* (New York: Da Capo Press, 1973). Instead of treating Shaw's opinion as the distillation and application of four decades of blasphemy jurisprudence, correct if unremarkable jurisprudentially, Levy charged Shaw with writing an opinion "wholly at variance with freedom of opinion on religion" (Levy, *Blasphemy*, 422). On Shaw, Kneeland, and literature see also John Thomas Matteson, "Blasphemy, Prudence, Slavery: Ethics in Law and Literature in the Age of Emerson" (Ph.D diss., Columbia Univ., 1991); Henry Steele Commager, "The Blasphemy of Abner Kneeland," *New England Quarterly* 8 (Mar. 1935), 29. For a sampling of nineteenth-century profanity cases, see Holcomb v. Cornish, 8 Conn. 374 (1831); Johnson v. Barclay, 16 N.J.L. 1 (1837); State v. Chrisp, 75 N.C. 528 (1881); Ex parte Delaney, 43 Cal. 478 (1972); Commonwealth v. Spratt, 14 Phila. Rpts. 365 (1880); Sanford v. State, 91 Miss. 158 (1907); State v. Wiley, 76 Miss. 282 (1898); State v. Moser, 42 Ark. 140 (1878); Bodenhammer v. State 60 Ark. 10 (1894); Commonwealth v. Linn, 158 Pa. 22 (1893); Gaines v. State, 7 Lea. 410 (Tenn., 1881). For Sabbath breaking, see Commonwealth v. Wolf, 3 Serge. & Rawl. 48 (Pa., 1817); Ex parte Andrews, 18 Cal. Rpts. 678 (1861); Shover v. State, 10 Ark. 259 (1850); Quarles v. State, 55 Ark. 10

(1891); Judefind v. State, 78 Md. 510 (1894); District of Columbia v. Robinson, 30 App. D.C. 283 (1908). The possible exception to the rule is found in Ohio, in Bloom v. Richards, 2 Ohio St. 387 (1853), holding that "neither Christianity, [n]or any other system of religion, is a part of the law of this State" while at the same time upholding a Sunday closing law on the theory that "the adoption of Sunday confers no superior religious position upon those who worship upon that day." Ibid., 393. Although no blasphemy prosecutions have been located for Ohio, the state still has a blasphemy and profanity statute in its criminal code.

35. After his conviction, Kneeland was the object of a petition on his behalf, signed by many liberal clergy, abolitionists, and reformers in Boston. Leonard W. Levy, "Satan's Apostle and Freedom of Conscience," ch. 4 in Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, Mass.: Harvard Univ. Press, 1957), esp. 56–58. Tolerance of freethinkers after Kneeland is illustrated by Robert Ingersoll, popular lecturer, lawyer, and the last of the great nineteenth-century infidels who was so far from being a threatening character in the late nineteenth century that his lectures were attended by bemused audiences, and his eccentricities were, for the most part, indulged rather than condemned. As Martin Marty explained the phenomenon, "Religion, having become a basic form of American belonging [over the course of the nineteenth century], antireligious prejudice disappeared." Martin E. Marty, *The Infidel: Freethought and American Religion* (Cleveland, Ohio: Meridian Books, 1961), 191.

36. Turner, *Without God, Without Creed*, 67. Lyman Beecher, *Sermons Delivered on Various Occasions* (Boston: John P. Jewett &Co., 1852), 138, 143–44.

37. Joseph Story, in his inaugural lecture as Dane Professor of Law at Harvard University in 1829, explained that reason and revelation were mutually reinforcing in natural law, a "check [on] the arrogance of power, and the oppression of prerogative, . . . the teacher as well as the advocate of rational liberty." Christianity, in Story's view, contained the essence of all natural law, "not merely an auxiliary, but a guide, to the law of nature; establishing [the] conclusions [of natural law], removing its doubts, and elevating its precepts." Story, "Value and Importance of Legal Studies," in *Miscellaneous Writings of Joseph Story*, William W. Story, ed. (Boston: C.C. Little and J. Brown, 1852). 534–35. On Kneeland's capacity to stir controversy and the reactions of Bostonians to Kneeland's claim to minister to the poor with his own brand of rationalism, see Mary Kupiek Cayton, "Toward a Democratic Politics of Meaning-Making: The Transcendentalist Controversy and the Rise of Pluralist Discourse in Jacksonian Boston" *Prospects* (forthcoming): 12–18.

38. Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (1904: London: G. Allen & Unwin, 1930); Charles Sellers, *The Market Revolution: Jacksonian America, 1815–1846* (New York, 1991), 237–68; Ronald G. Walters, "Control: Sexual Attitudes, Self-Mastery, and Civilization," ch. 5 in Walters, *The Antislavery Appeal: American Abolitionism after 1830* (New York: Norton, 1978); Mary P. Ryan, "Privacy and the Making of the Self-Made Man," ch. 4 in Ryan, *Cradle of the Middle Class*. On the power of sympathetic identification, see Clark, "The Sacred Rights of the Weak," 463.

39. Thomas Haskell, "Capitalism and the Origins of Humanitarian Sensibility" in *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation*, Thomas Bender, ed. (Berkeley, Calif.: Univ. of California Press, 1992), 136–60; cf. Clark, "Sacred Rights of the Weak." For the quoted language, see Samuel Gridley Howe, "Atheism in New England," *New England Magazine* 7 (1834), 500, 503. On Howe's dedication to the defense of Christianity and his correlative commitment to abolitionism, see Harold Schwartz, *Samuel Gridley Howe: Social Reformer, 1801–1876* (Cambridge, Mass.: Harvard Univ. Press, 1956).

40. John Barton Derby, *Political Reminiscences, Including a Sketch of the Origin and History of the "Statesmen" Party of Boston* (Boston; Holmer & Palmer, 1835), 144, qtd. in Leonard Levy, "Satan's Last Apostle in Massachusetts," *American Quarterly* 5 (spring 1953), 17.

41. Samuel I.D. Parker, "Report of the Arguments of the Attorney of the Commonwealth at the Trials of Abner Kneeland for Blasphemy in the Municipal and Supreme Courts, Boston, Jan. and May 1834," repr. in Levy, ed., *Blasphemy in Massachusetts*, 177 (emphasis in original). Updegraph, 11 Serge. & Rawl., 399.

42. The adaptation of an English legal heritage to local circumstances through caselaw was complemented in the second quarter of the nineteenth century by legal treatises written by Kent and Joseph Story. So patently nationalistic was this treatise literature that one commentator observed in 1827 that the publication of Kent's *Commentaries on American Law* the year before had forever banished "the masses of foreign lore" from American bookshelv → John H. Langbein, "Chancellor Kent and the History of Legal Literature," *Columbia Law Review* 93 (Apr. 1993): 547; George Goldberg, "James Kent, the American Blackstone: The Early Years," in Alan Harding, ed., *Law-Making and Law-Makers in British History: Papers Presented to the Edinburgh Legal History Conference, 1977* (London: Royal Historical Society, 1980); John T. Horton, *James Kent: A Study in Conservatism, 1763–1847* (New York: D. Appleton-Century Co., 1939).

43. On the influence of legal literature generally in the antebellum era, → A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," *University of Chicago Law Review* 48 (1981): 632; Roscoe Pound, "Doctrinal Writing," ch. 4 in Pound, *The Formative Era of American Law* (1938; Gloucester, Mass.: Peter Smith, 1960). The quote in the text is from George Bancroft, without further attribution, in Miller, *Life of the Mind*, 157.

44. On lawyers' storytelling and the emotional appeal to jurors and spectators at popular trials, see Laura Hanft Korobkin, "The Maintenance of Mutual Confidence: Sentimental strategies at the Adultery Trial of Henry Ward Beecher," *Yale Journal of Law and the Humanities* 7 (summer 1995): → Hendrick Hartog, "Lawyering, Husbands' Rights and the 'Unwritten law' in Nineteenth-Century America," *Journal of American History* 84 (June 1997): 67; Robert Ferguson, "Story and Transcription in the Trial of John Brown," *Yale Journal of Law and the Humanities* 6 (winter 1994): 37; Cohen, *Pillars of Salt*; Melissa J. Ganz, "Wicked Women and Veiled Ladies: Gendered Narratives of the McFarland-Richardson Tragedy," *Yale Journal of Law and Feminism* 9 (winter 1997). The case was Vidal v. Girard's Executors, 43 U.S. [2 How.] 126, 174 (1844). Charles Warren, *The Supreme Court in United States History* vol. 2 (Boston: Little, Brown and Co., 1922), 398–407. After attending the argument, one congressman remarked that "[t]here is no use for ministers now. Daniel Webster is down in the Supreme Court room eclipsing them all by a defence of the Christian religion. Hereafter we are to have the gospel according to Webster." John Wentworth, "Congressional Reminiscences," 35–36, qtd. in Robert V. Remini, *Daniel Webster, The Man and His Time* (New York: W.W. Norton & Co., 1997), 589. See also Rufus Choate, "A Discourse Commemorative on Daniel Webster" and "Remarks Before the Circuit Court on the Death of Mr. Webster," in Samuel Gilman Brown, ed., *The Works of Rufus Choate* vol. 1 (Boston: Little, Brown and Co., 1862), 479, 493.

45. 43 U.S. [2 How.], 198, 200. The anticlericalism of the bequest, Story said in so many words, would not justify a conclusion that the will was contaminated by full-blown anti-Christianity, a distinction that Webster had argued could not validly be drawn, but which in other contexts (such as in the work of Robert Baird) served the defenders of "general Christianity" well. Kent to Story, discussed in James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* (Norman, Okla.: Univ. of Oklahoma Press, 1971), 371.

46. Miller, *the Life of the Mind*, 206 (apparently quoting from the *Southern Literary Messenger*). While it might be doubted whether a lawyer was in fact professionally incapable of being anything other than a believing Christian, it is certainly true that by mid-century it would most likely be professionally disabling to proclaim lack of faith.

47. By the middle of the twentieth century, courts and commentators began to question the constitutionality of blasphemy statutes. Only one court has explicitly held a blasphemy statute unconstitutional. State v. West, 263 A.2d 602 (Md. 1970). See also Original Fayette County Civic & Welfare League v. Ellington, 309 F. Supp. 89 (W.D. Tenn., 1942); *American Law Reports*, 3d Series (Rochester, N.Y.: Lawyers Co-operative Publishing Co., 1972), 519–25; *American Jurisprudence*, 2d ed. (Rochester, N.Y.: Lawyers Co-operative Publishing Co., 1997), 258–62. In twentieth-century Supreme Court doctrine, the "speech-conduct" distinction, which extends constitutional protection to expression but not to action, replicates in its essentials the belief-action distinction. Attempting to draw lines between speech and conduct creates practical difficulties similar to those produced in the distinction between belief and action. Also worth noting is the twentieth-century idea that speech and action are distinguishable. See, e.g., O'Brien v. United States, 391 U.S. 367 (1969). In O'Brien, the court held that burning a draft card as part of an antiwar protest was conduct and was therefore subject to criminal penalty).

48. J.H. Beadle, *Life in Utah; or, The Mysteries and Crimes of Mormonism* (Philadelphia, Pa.; National Publishing, 1890), 332. Updegraph, 11 Serge. & Rawl., 399. On marriage and voluntarism, see Karen Lystra, *Searching the Heart: Women, Men, and Romantic Love in Nineteenth-Century America* (New York: Oxford Univ. Press, 1989); Gordon, "The Liberty of Self-Degradation," 839.

49. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little, Brown and Co., 1868), 472. On Cooley, see Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon upon American Constitutional Law* (Berkeley, Calif.: Univ. of California Press, 1954); Alan Jones, "Thomas M. Cooley and the Michigan Supreme Court," *American Journal of Legal History* 10 (1966), 97. Howe, "Atheism in New England," *New England Magazine* 8 (1935): 53–56. As Howe put it:

> He who is prepared to let the infidels advance one step, must concede to them the whole ground; if a man has a right to try to shake the belief of his neighbor's wife in the sanctity of the marriage vow, he has a right to seduce her from him; if he has a right to rail against virtue, he has a right openly to encourage vice, and by music and dancing and feasting, to add to the force of his reasonings; if he may call in question the rights of property, he may lay his hands on what he can get; if he has a right to persuade the poor and ignorant, that laws are made only *to oppress them*, he has a right to excite them to riot, and to lead them on to break open prisons, and let out the persecuted men who are not thieves, but only *dividers of property*.

50. For overviews of the three groups see Lawrence Foster, *Religion and Sexuality: Three American Communal Experiences of the Nineteenth Century* (New York: Oxford Univ. Press, 1981), and *Women, Family and Utopia: Communal Experiments of the Shakers, the Oneida Community and the Mormons* (Syracuse, N.Y.: Syracuse Univ. Press, 1991); Louis J. Kern, *An Ordered Love: Sex Roles and Sexuality in Victorian Utopias: The Shakers, the Mormons, and the Oneida Community* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1981); Carol Weisbrod, *The Boundaries of Utopia* (New York: Pantheon Books, 1980). The quote is from Beadle, *Life in Utah*, 332–33.

51. James Kent, *Commentaries on American Law*, O.W. Holmes, Jr., ed. vol. 2 (Boston: Little, Brown and Co., 1873), 81. The "Revelation on Celestial Marriage," the

basic Mormon text on the importance of marriage and the family, was dictated by Smith in 1843, although historical evidence places the actual practice of polygamy at an earlier date. For the text of the Revelation, see *The Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints* (Salt Lake City, Utah: G.Q. Cannon & Sons, 1891), sec. 132. For discussions of early polygamy, see Richard S. Van Wagoner, *Mormon Polygamy: A History* 2d ed. (Salt Lake City, Utah: Signature Books, 1989); B. Carmon Hardy, *Solemn Covenant: The Mormon Polygamous Passage* (Urbana, Ill.: Univ. of Illinois Press, 1992).

52. For an insightful critique of anti-Mormonism in the antebellum period, see David Brion Davis, "Some Themes of Counter-Subversion: An Analysis of Anti-Masonic, Anti-Catholic, and Anti-Mormon Literature," *Mississippi Valley Historical Review* 47 (Sept. 1960): 224. Ralph Waldo Emerson called the faith "an afterclap of Puritanism," qtd. in James Bradley Thayer, *A Western Journey with Mr. Emerson* (Boston: Little, Brown and Co., 1844), repr. in William Mulder and A. Russell Mortensen, eds., *Among the Mormons: Historic Accounts by contemporary Observers* (New York: Alfred Knopf, 1958), 382. For prominent examples of twentieth-century scholarly treatments of early Mormonism in light of contemporary religious developments, see David Brion Davis, "The New England Origins of Mormonism," *New England Quarterly* 26 (June 1953): 154; Charles C. Sellers, "God and Mammon," ch. 7 in Sellers, *The Market Revolution*; Gordon S. Wood, "Evangelical America and Early Mormonism," *New York History* 61 (Oct. 1980): 356; Hatch, *Democratization*, 113–22, 167–70; R. Laurence Moore, *Religious Outsiders and the Making of Americans* (New York: Oxford Univ. Press, 1986), 25–47; Cross, *Burned-Over District*, 76, 148–49; John L. Brooke, *The Refiner's Fire: Mormon Cosmology 1644–1844* (New York: Cambridge Univ. Press, 1994). On the embarrassment occasioned by the flourishing of such a religious system, see Gordon, "'The Liberty of Self-Degradation,'" 817–20. For the quoted language, see Lawton, *Blasphemy*, 6. On the language of corruption and the war of words, see Joseph Smith, Jr., *History of the Church of Jesus Christ of Latter-day Saints* 2nd ed., vol. 1 (Salt Lake City, Utah: Deseret Book Company, 1963), 4, 6.

53. For examples of such dueling "higher law" arguments, compare T.W. Curtis, *The Mormon Problem: The Nation's Dilemma: A New Data, New Method Involving Legal Questions of the Day* (New Haven, Conn.: Hoggson & Robinson, 1885), with Davis Bitton, "Polygamy Defended: One Side of a Nineteenth-Century Polemic," in Bitton, *The Ritualization of Mormon History and Other Essays* (Urbana, Ill.: Univ. of Illinois Press, 1994), 38–41.

54. Reynolds v. United States, 98 U.S. [8 Otto] 145, 162–64, 166 (1879).

55. Davis v. Beason, 133 U.S. 333, 341 (1890).

56. Updegraph, 11 Serge. & Rawl., 399. See also People v. Ruggles, 8 John., 297: "[W]icked and malicious words, writings and actions which . . . vilify the gospels . . . are inconsistent with the reverence due to the administration of an oath, and among their other evil consequences, they tend to lessen, in the public mind, its religious sanction." Davis, 133 U.S., 345, 348.

57. The punishment of blasphemy was lawful, in the eyes of Chancellor Kent for example, because the vast majority of the population was Christian.

58. The courts in Chandler, Updegraph and Kneeland held that statutory punishment of blasphemy was based on democratically enacted legislation and connected to the validity of legislation based on acts rather than belief, the same ground that the United States Supreme Court stressed in the Reynolds case.

59. Chandler, 2 Harr., 567–68.

60. See, e.g., David Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge Univ. Press, 1997), ix.